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June 21, 2011

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petition for Declaratory Ruling Regarding Zevo-3*, MB Docket No. 10-190
Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

On Friday June 17, 2011, Angela Campbell, Guilherme Roschke and Georgetown Law student Lauren Wilson of the Institute for Public Representation, which serves as counsel to the Campaign for a Commercial Free Childhood ("CCFC"), met with Robert Ratcliffe, Holly Sauer, Mary Beth Murphy and Dave Konczal from the Media Bureau and Austin Schlick, Jacob Lewis, Marilyn Sonn and William Scher from the Office of the General Counsel.

CCFC expressed concern that the FCC has yet to move forward on its Petition for a Declaratory Ruling regarding *Zevo-3*. CCFC then explained, as it did in the original petition for declaratory ruling and the reply, why *Zevo-3* violated the advertising limits in Children's Television Act ("CTA") and various other FCC rules and policies.

CCFC pointed out that in implementing the CTA, the FCC adopted a rule defining commercial matter as "air time sold for the purposes of selling a product or service." In determining whether time has been "sold," the Commission explained that "we mean that the advertiser must give some valuable consideration either directly or indirectly to the broadcaster or cablecaster as an inducement for airing the material." *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2112 (1991). On reconsideration, the Commission explicitly recognized that "barter contracts, depending on their terms, may involve consideration furnished as an inducement to air commercial matter." 6 FCC Rcd 5093, 5094-95 (1991). CCFC contended that whether Skechers USA, Inc. ("Skechers") economically induced MTV Networks ("MTVN") to air *Zevo-3* could only be determined by examining the complete terms of MTVN and Skechers' agreements, including the licensing fee paid by MTVN, the value of the advertising time Skechers bought from MTVN, and the value of MTVN and Skechers' shared merchandising agreement. CCFC stressed that the Commission cannot rely merely on MTVN's bare, self-interested assertion that it pays Skechers a standard industry license fee because that claim is not subject to verification. CCFC distinguished this situation from that in NABB's complaint against KCOP for airing *He-Man*. That case involved a simple barter arrangement in which the station received the program but instead of paying cash, had the right to sell airtime worth a known amount.

CCFC also expressed disagreement with the argument that the FCC's definition of "program-length commercials" (PLCs) somehow eliminated the need for the Commission to determine intent. In a different section of the same order in which the Commission defined "commercial matter," it also adopted a definition of a PLC as "a program associated with a product in which commercials for that product are aired." *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon*. 6 FCC Rcd 5093 (1991). This test, in effect, presumes that a program is intended to promote a product when that product appears in both the program and in the advertisements shown during or adjacent to the program. However, the PLC definition in no way eliminates the need to determine whether a "program" is "commercial matter" because it is "air time sold for the purposes of selling a product or service."

Moreover, in this case, the program producer clearly indicated that the intent of the program was to promote Skechers' brands. For example, Kristen Van Cott, Vice President of Creative Development for Skechers Entertainment, stated that "We will leverage the marketing and promotional power of the SKECHERS brand at retail to raise the visibility of Zevo-3 in a truly impactful way. . . This promotion will generate brand awareness among the exact audience we need to reach." Business Wire, June 8, 2010 (included in the Appendix to CCFC's Petition).

Further, even if *Zevo-3* does not meet the Commission's definition of a PLC, it still fails to comply with the Commission's requirement that programming and commercial matter be clearly separated. The separations requirement was intended to help children, who lack the cognitive capacity to identify and understand the persuasive intent of commercial matter. Creating a show around advertising characters whose names are the same as shoes and who share similar attributes with shoes of the same name, is inherently misleading and unfair to children.

CCFC explained that *Zevo-3* presented a new set of facts on which the Commission has never ruled. *Zevo-3* is different from programs such as *Power Rangers* or *Sesame Street*, in which popular characters from the program are licensed to toy manufacturers. *Zevo-3*'s characters were conceived as advertisements and have no identity or value apart from those as advertisements.

CCFC recognized that children's media and advertising have changed over time. A great deal more children's programming is available today than in the 1970s, when these policies originated. Moreover, children are no longer limited to accessing programs on broadcast and cable television. The availability of programming on demand may reduce the reliance on advertising and licensing to ensure funding for children's programming. Moreover, marketing techniques have changed as well. Marketing to children occurs across platforms and marketers are using techniques such as advergames, viral marketing and targeted ads. For these reasons, CCFC would support the initiation of a rulemaking to consider whether the rules regarding advertising to children need to be modernized, as has been suggested by Professor Dale Kunkel.

However, CCFC explained that it was not necessary to await a new rulemaking. Rather, CCFC urged the Commission to apply its existing rules and policies to this new set of facts. CCFC urged the Commission to act quickly because the failure to act would result in the proliferation of children's programming built around popular product spokescharacters, such as Tony the Tiger, Ronald McDonald and M&Ms. This outcome would be especially harmful to efforts to address the epidemic of childhood obesity.

Respectfully submitted,

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cc (*via email*):
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